



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CONSTITUTIONAL PETITION NO. 23 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS

AND FREEDOMS IN ARTICLES RIGHT TO CLEAN AND SAFE DRINKING WATER

AS ENSHRINED IN THE ARTICLE 43 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE

CONSTITUTION PRACTICE AND PROCEDURE RULES

AND

ADRIANO NGETU.....1ST PETITIONER

BAARIU BONASHINE ROMAN.....2ND PETITIONER

MORRIS KOOME MURUNGI3RD PETITIONER

VERSUS

HON. JOHN KANYUITHIA MUTUNGA.....RESPONDENT

RULING

1. This is a ruling on a notice of motion dated 19/9/2019 brought under articles 43 of the constitution of Kenya, order 51 rule 1, order 40 rule 1 of the civil procedure rules, section 1A, 1B and 3A of the Civil Procedure Act seeking an order of temporary injunction restraining the respondent whether by himself, his agents and/or servants from carrying out any activities, demolishing, wasting, constructing on, alienating or otherwise interfering within Mwanika Borehole which provides clean water to the Mwanika Community pending the hearing and determination of this application and the suit as well as costs of the application.

2. The application was based on the grounds on the face of it and on the supporting affidavit of Adriano Ngetu and having been given authority by other petitioners stated that they have been residing at Mwanika Athwana ward within Meru County for over 30 years and during this time they have been using Mwanika Borehole Water for domestic and other purposes. The respondent a member of parliament Tigania West has threatened to demolish the said borehole and the petitioners wrote to him to find out what the reason behind those threats could be. However, while addressing a public baraza at Kongo Ka Kanyoro Chiefs Camp, the respondent made it clear that he would lead the demolition of the said Mwanika Borehole. He has gone on to ignore any attempts to save the said borehole which has been vital in supplying clean water to the community. If destroyed the said community may suffer loss and damages as a result. The residents of Mwanika will be deprived of their right to clean water and unless the orders sought are granted it will contribute to the deprivation of right to life in the long run.

3. The application was opposed by the respondent via his replying affidavit where it is stated that the applicants moved this court in their capacity as officials which has not been proven. Additionally, they have not placed any material facts before this court to prove their allegations against him. He indicated that he is not an official of Mwanika Borehole Community Based organization nor does he have any personal knowledge of the alleged threats. He is not personally involved in any project nor does he have any interest in a public borehole.

4. He conducted an investigation and found that there is no public bore hole within Mwanika area, save the one owned and operated by Mwanika Primary School. There is no connection between the allegations of the applicant and his duties as a sitting member of parliament and he has no direct role to play in matters of implementation of development projects except the primary role of oversight to safeguard public resource from abuse or misuse.

5. **Section 63 (c) (e) of the Civil Procedure Act** gives this Court power to grant orders of a temporary injunction in all cases in which it appears to it to be just and convenient to do so. The general considerations for the granting of a temporary injunction are set out under **Order 40 of the Civil Procedure Rules** and applies where “ **any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit.....**”. The grant of a temporary injunction is invariably in the discretion of the Court.

6. The applicants having come to this court to seek an equitable relief they must establish that they deserve the order sought. The issue of injunction is guided by **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

7. Water is a basic commodity. Conflicts of great magnitude are manifested due to the clamour for the precious liquid. **Article 43 (1)(d) of the constitution** provides that “**Every person has a right to clean and safe water in adequate quantities**”. All that the applicants desire in so far as this application is concerned is to ensure that their right to safe and clean water is not threatened. They therefore have a prima facie case of which damages would not be an adequate remedy. The balance of convenience tilts in their favour.

8. The hiccup here is that the existence of the bore hole has been denied by the respondent. A bore hole is however something conspicuous. It can be seen with the naked eye. It is therefore just a question of ascertaining whether the same exists or not. If indeed the same exists, then the same ought to be preserved until the suit is heard and determined. There is an allegation that respondent could have demolished the same. However, this again is an issue which the court can ascertain as the case is ongoing.

9. For now, I do allow the application dated 19.9.2019, but costs thereof shall abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE